

***United States Court of Appeals
for the Second Circuit***

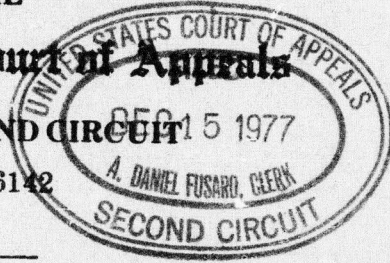


APPELLEE'S BRIEF

77-6142

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 77-6142



THE HARTFORD PROVISION COMPANY,
Plaintiff-Appellee,

VS.

UNITED STATES OF AMERICA,
Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF CONNECTICUT

**BRIEF FOR THE PLAINTIFF-APPELLEE,
THE HARTFORD PROVISION COMPANY**

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STATEMENT OF THE ISSUE PRESENTED

Was the District Court correct in holding that the Hartford Provision Company, which held a garnishment lien on certain funds and which had reduced its claim to judgment, had obtained an execution and delivered the same to a proper officer, but which execution had not been served prior to the filing of a Federal tax lien, had achieved the status of a "judgment lien creditor" as defined in §6323(a) of the Internal Revenue Code (26 U.S.C. §6323(a)) so as to have priority over such Federal tax lien?

STATEMENT OF THE CASE

The Hartford Provision Company (Hartford Provision) brought this action in the United States District Court for the District of Connecticut pursuant to §7426(a) of the Internal Revenue Code (26 U.S.C. §7426(a)) to recover the sum of \$6,066 wrongfully levied upon by the Internal Revenue Service pursuant to a Federal tax lien. (A. 5, 13).¹ On cross-motions for summary judgment, the parties having stipulated to the facts (A. 3-12), the District Court (Newman, J.) rendered a decision for Hartford Provision. (A. 13-17). The United States appealed from the judgment rendered on that decision to this Court. (A. 2, 18).

The material facts may be stated briefly. On December 12, 1974² Hartford Provision obtained from the Connecticut Superior Court an order permitting the garnishment (also known under Connecticut law as foreign attachment) of funds held by the Community Renewal Team of Greater Hartford, Inc. (CRT) for Thomas H. Hall Associated, Inc. (Hall). (A. 3). The writ of garnishment was served on CRT on December 17, 1974, at which time it was indebted to Hall in the amount of \$6,066.16. (A. 3).

On January 31, 1975, Hartford Provision recovered a judgment in the Superior Court against Hall in the amount of \$15,705.02 in damages and \$143.40 in costs. (A. 3). Also on that date CRT placed \$6,066 in an ac-

¹References are to the Appendix, separately bound, filed by the United States.

²The United States correctly states that the District Court's decision contains a typographical error as to this date. (Brief, Pg. 2).

count at the Connecticut Bank and Trust Company designated as "CRT-Thomas Hall Associates Creditors Account." (A. 3-4).

An execution was obtained by Hartford Provision and on March 4, 1975, an unsuccessful attempt was made by a deputy sheriff to serve it on CRT. (A. 4). On February 24, the Internal Revenue Service had made an assessment against Hall for \$6,889.21, representing withholding and social security taxes, and notices of tax lien were duly recorded on March 6, 1975. (A. 4). On March 7, Hartford Provision again made an unsuccessful attempt at service. (A. 4). On the same day the Internal Revenue Service served a notice of levy on the Connecticut Bank and Trust Company, which paid the funds over to the Internal Revenue Service by check dated March 13. (A. 4-5). Service on CRT was effectuated by the deputy sheriff on behalf of Hartford Provision on March 25, 1975. (A. 4).

Hartford Provision filed a claim with the Internal Revenue Service for return of the funds in question, and this action was timely instituted. (A. 5).

In his memorandum of decision, Judge Newman correctly held that the question of law was whether, on the above facts, Hartford Provision was a "judgment lien creditor", as set forth in §6323(a) of the Internal Revenue Code, on March 6, 1975. (A. 15). Citing the three-fold test articulated by the Supreme Court in several tax lien decisions, Judge Newman held that as of that date Hartford Provision had a "choate" lien. (A. 15-16). Holding that the judgment on January 31, 1975, established the elements of the three-fold test, and rejecting the argument of the United States that execution was a condition precedent to the existence of a valid lien, he decided the issues in favor of Hartford Provision. (A. 16-17).

SUMMARY OF ARGUMENT

The issue before this Court is whether Hartford Provision was a "judgment lien creditor" entitled to priority over the United States tax lien under §6323(a) as of March 6, 1975. Admitting now, for the first time, that the lien of Hartford Provision was on that date "choate" in that the identity of the lienor, the amount of the lien and the property subject to the lien were all established on that date (Brief, Pg. 5), the United States now asserts that the additional criterion "that the state lien must be absolutely perfected under the applicable state law" must also be met. In short, the United States contends that under the law of Connecticut Hartford Provision's lien lacked one step necessary for perfection --- the levy of execution.

We submit, however, that this additional test is wholly inapplicable, and that even if this test were to be applied, under Connecticut law Hartford Provision's lien was fully perfected, in that the levy of execution terminated, rather than perfected, the lien. In short, rather than levy being a condition *precedent* to a perfected lien, failure to levy within the sixty day statutory period is a condition *subsequent* that divests an already perfected lien.

ARGUMENT

Hartford Provision's Lien

Was Perfected Under Connecticut Law

The United States, having now agreed that Hartford Provision's lien meets all of the criteria of choateness,³ as set forth in decisions of the United

³See, *United States v. Security Trust & Savings Bank*, 340 U.S. 47 (1950); *United States v. City of New Britain*, 347 U.S. 81 (1950); and *United States v. Vermont*, 377 U.S.(1964).

States Supreme Court, claims that by reason of the provisions of state law these criteria are irrelevant. This assertion, we submit, is contrary to both the very language and the clear congressional intent of §6323 (a). In enacting §6323 (a), as revised in 1966, Congress determined that persons having the status of a "judgment lien creditor" would have priority over a subsequently perfected Federal tax lien. Congress in §6323 (a) did not define the term, but Treasury Regulations, 26 C.F.R. §301.6323 (h)-1 provide as follows:

(g) *Judgment Lien Creditor.* The term "judgment lien creditor" means a person who has obtained a valid judgment in a court of record and of competent jurisdiction for the recovery of specifically designated property or for a certain sum of money. In the case of a judgment for the recovery of a certain sum of money, a judgment lien creditor is a person who has perfected a lien under the judgment on the property involved. A judgment lien is not perfected until the identity of the lienor, the property subject to the lien and the amount of the lien are established. *Accordingly, a judgment lien does not include an attachment or garnishment lien until the lien has ripened into judgment.* even though under local law the lien of the judgment relates back to an earlier date. *** (Emphasis supplied).

Up to this point the Treasury Regulation gives no support whatsoever to the United States, which apparently relies upon a following sentence of the cited Treasury Regulation:

If under local law levy or seizure is necessary before a judgment lien becomes effective against third parties acquiring liens on personal property, then a judgment lien under such local law is not perfected until levy or seizure of the personal property involved.

This sentence, we submit, applies only if under state law another "third party" state law creditor could obtain priority over the "judgment lien creditor" who had not made levy or seizure. In the present case, Connecticut law does not so provide.

Section 52-329 of the Connecticut General Statutes provides, in relevant part, that a plaintiff in a civil action may cause garnishment process to issue to a person holding property for or indebted to the defendant,

and from the time of leaving such copy [with the garnishee] all the effects of the defendant in the hands of any such garnishee, and any debt due from any such garnishee to the defendant, and any debt, legacy or distributive share, due or that may become due to him from such executor, administrator or trustee in insolvency, not exempt from execution, shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover.

Following the rendition of judgment, the plaintiff then has sixty days, exclusive of any statutory stay of execution, to make demand upon the garnishee, as is provided in §52-328:

No estate which has been attached shall be held to respond to the judgment obtained in the suit *** unless the judgment creditor takes out an execution and has it levied on the personal estate attached, or demand made on the garnishee in cases of foreign attachment, within sixty days after final judgment, ***.

When demand is made the garnishee must either make payment or be subject to personal liability in a *scire facias* action brought by the judgment creditor under §52-381.

As the District Court properly observed the effect of §52-328 is merely to limit the duration of the lien following judgment or, in other words, to create a condition subsequent which acts to divest a "judgment lien" within the meaning of §6323(a) of the Internal Revenue Code at the expiration of a certain time period:

"The Connecticut Statute, as its title states, concerns the *duration* of an attachment lien after judgment, requiring execution to be levied within sixty days of judgment to maintain validity of the lien." (A. 16).

Within the sixty day period after judgment no third party creditor can obtain superior rights over the first creditor; it is only when the prior judgment lien expires by lapse of time that the second judgment lien creditor gain priority. See, *Bradbury v. Wodjenski*, 159 Conn. 366, 269 A. 2d 271 (1970).

It is primarily upon *Bradbury* that the United States relies. Such reliance is, however, misplaced. *Bradbury* was an interpleader action brought to determine the respective rights of three claimants to a fund held by a garnishee. One creditor never brought any legal action, and was therefore held to have no claim whatsoever to the fund. The second made garnishment and obtained a judgment but let the sixty day period expire without making demand. The third made garnishment, obtained a judgment and an execution and made demand within the sixty day period. The Connecticut Supreme Court gave priority to the third claimant, stating:

Although every attachment takes precedence over any subsequent attachment, each must be perfected by a timely issue and levy of execution upon the property attached. *Coit v. Sistare*, 85 Conn. 573, 578, 84 A. 119. A judgment creditor, in order to perfect an attachment or garnishment made prior to judgment on his claim, must take out an execution and have it levied on the real or personal estate attached or have demand made on the garnishee within sixty days after final judgment. General Statutes §52-328; *Markham v. Salovitz*, 147 Conn. 189, 190, 158 A. 2d 249. If not thus perfected [a]ny lien created by the attachment on this property . . . continued for sixty days after the judgment,

and no longer. *Sanford v. Pond*, 37 Conn. 588, 594.⁴

As the language "*continued for sixty days after the judgment, and no longer*", makes clear, the Connecticut Supreme Court has held that a judgment lien is effective against third parties for a period of sixty days after the rendition of judgment, so long as levy and execution take place within that period. Within that sixty day period it is not true that in Connecticut, in the words of the Treasury Regulation relied on by the United States, "levy or seizure is necessary *before* a judgment lien becomes effective against third parties acquiring liens on personal property." (Emphasis supplied). The lien is perfected as of the date of judgment; under both the Federal and state tests, although it is subject to being divested upon the expiration of that time. The making of demand does not extend the duration of the lien. Therefore, in *Bradbury* the issue was only whether a lien expired after sixty days so as to permit a junior lien to take priority.

The reasoning urged by the United States would have the effect of rendering every "judgment lien" that is limited as to time subordinate to a federal tax lien. Such a result is plainly inconsistent with the in-

⁴"Perfect" has been defined as "Complete; finished; executed; enforceable; without defect * * * ." *Black's Law Dictionary* (4th Ed.) 1295. In *Bradbury*, the Connecticut Supreme Court clearly meant that the lien in question was "perfected" in the sense of being "finished" or "executed", in contrast to the sense of being "complete" or "without defect".

tent of Congress as expressed in §6323 (a). In the present case the expiration of the sixty day period ends the judgment lien by operation of law. Such lien would also end, however, if the sheriff were to make levy, for then either the goods would be paid over to the sheriff, extinguishing the lien by payment, or payment would be refused, extinguishing the lien and substituting personal liability as provided in the statutes.

The "judgment lien" here was therefore choate within the well established rule of *United States v. City of New Britain*, 347 U.S. 81 (1954). There was nothing more to be done by Hartford Provision under Connecticut law to Perfect its lien as against a third party creditor. Under these circumstances it is clear that under the Federal statute, §6323 (a) of the Internal Revenue Code, and under the Treasury Regulation interpreting that statute Hartford Provision is entitled to prevail over the claim of the United States.

CONCLUSION

Section 6323 (a) of the Internal Revenue Code grants priority over the United States with respect to a federal tax lien to prior judgment lien creditors. As interpreted both by decisions of the United States Supreme Court and by the Treasury Regulation §301.6323 (h-1), what is required to be a judgment lien creditor is that there be (1) the judgment of a court of record, (2) such judgment being for the recovery of a certain sum of money, and (3) a lien on specific property. Nothing more is required so long as the lien exists under state law. The lien in this case existed from the date of judgment, which predated the United States tax lien and it continued until after the United States

had asserted its tax lien until such time as the sheriff made demand. Demand having been made within the sixty days, no rights were lost by Hartford Provision and it is entitled to priority. As pointed out above a contrary result would cast in doubt every judgment lien limited as to time, something clearly contrary to the expressed Congressional intent.

For the above reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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ADDENDUM
STATUTES INVOLVED

26 U.S.C. §6323. Validity and priority against certain persons

(a) Purchases, holders of security interest, mechanic's lienors, and judgment lien creditors. - The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary of his delegate.

(f) Place for filing notice; form. -

(1) Place for filing. - The notice referred to in subsection (a) shall be filed -

(A) Under State laws. -

* * *

(ii) Personal property. - In the case of personal property, whether tangible or intangible, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; ***

26 U.S.C. §7426. Civil actions by persons other than taxpayers.

(a) Actions permitted. -

(1) Wrongful levy. - If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district

court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary or his delegate.

* * *

(b) Adjudication. - The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

* * *

(2) Recovery of property. - If the court determines that such property has been wrongfully levied upon, the court may -

(B) grant a judgment for the amount of money levied upon:

* * *

(g) Interest. - Interest shall be allowed at an annual rate established under section 6621 -

(1) in the case of a judgment pursuant to subsection (b) (2) (B), from the date the Secretary or his delegate receives the money wrongfully levied upon to the date of payment of such judgment; * * *

28 U.S.C. § 1346. United States as defendant

* * *

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 of the Internal Revenue Code of 1954.

* * *

Connecticut General Statutes,

Sec. 52-328. Duration of attachment liens after judgment. No estate which has been attached shall be held to respond to the judgment obtained in the suit, either against the debtor or any other creditor, unless the judgment creditor takes out an execution and has it levied on the personal estate attached, or demand made on the garnishee in cases of foreign attachment, within sixty days after final judgment, or levied on the real estate attached, and the same appraised, and the execution and proceedings thereon recorded, within four months after such judgment; or, if such goods or estate is encumbered by any prior attachment, unless the execution is so levied within the respective times aforesaid after such encumbrance has been removed; except only in case of a foreign attachment against an executor, administrator or trustee in insolvency, upon whom demand shall be made within the times limited in sections 52-389, 52-390 and 52-391. In determining said periods within which the attaching creditor is so required to take out and levy execution, any time during which the issue or levy of an execution may be prevented or stayed by the pendency of a writ or error, or by an injunction or other legal stay of execution, shall be excluded from the computation.

Connecticut General Statutes,

Sec. 52-329. Process of foreign attachment. When the effects of the defendant in any civil action in which a judgment or decree for the payment of money may be rendered are concealed in the hands of his agent or trustee so that they cannot be found or attached, or when a debt is due from any person to such defendant, or when any debt, legacy or distributive share is or

may become due to such defendant from the estate of any deceased person or insolvent debtor, the plaintiff may insert in his writ, subject to the provisions of sections 52-278a to 52-278g, inclusive, a direction to the officer to leave a true and attested copy thereof and of the accompanying complaint, at least twelve days before the session of the court to which it is returnable, with such agent, trustee, or debtor of the defendant, or, as the case may be, with the executor, administrator or trustee of such estate, or at the usual place of abode of such garnishee; and from the time of leaving such copy all the effects of the defendant in the hands of any such garnishee, and any debt due from any such garnishee to the defendant, and any debt, legacy or distributive share, due or that may become due to him from such executor, administrator or trustee in insolvency, not exempt from execution, shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover.

Connecticut General Statutes,

Sec. 52-381. Liability of garnishee; scire facias. If judgment is rendered in favor of the plaintiff in any action by foreign attachment, all the effects in the hands of the garnishee at the time of the attachment, or debts then due from him to the defendant, and any debt, legacy or distributive share, due or to become due the defendant from any garnishee as an executor, administrator or trustee, shall be liable for the payment of such judgment. The plaintiff, on praying out an execution, may direct the officer serving the same to make demand of such garnishee for the effects of the defendant in his hands, and for the payment of any debt due the defendant, and such garnishee shall pay such debt or produce such effects, to be taken and

applied on such execution. If he has in any manner disposed of the effects of the principal in his hands when the copy of the writ was left with him, or does not expose and subject them to be taken on the execution, or does not pay to the officer when demanded the debt due the defendant at the time the copy of the writ was left with him, such garnishee shall be liable to satisfy such judgment out of his own estate, as his proper debt, if the effects or debt is of sufficient value or amount; if not, then to the value of such effects or to the amount of such debt. * * *

* * *

REGULATION INVOLVED

Treasury Regulations on Procedure and Administration (1954 Code) (26 C.F.R.):

§ 301.6323 (h)-1 *Definitions.*

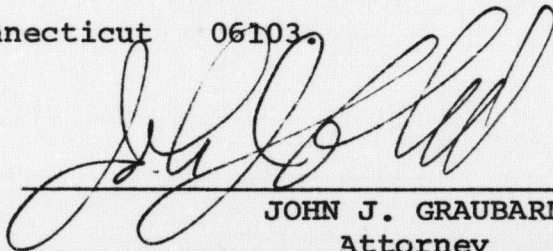
* * *

(g) *Judgment lien creditor.* The term "judgment lien creditor" means a person who has obtained a valid judgment, in a court of record and of competent jurisdiction, for the recovery of specifically designated property or for a certain sum of money. In the case of a judgment for the recovery of a certain sum of money, a judgment lien creditor is a person who has perfected a lien under the judgment on the property involved. A judgment lien is not perfected until the identity of the lienor, the property subject to the lien, and the amount of lien are established. Accordingly, a judgment lien does not include an attachment or garnishment lien until the lien has ripened into judgment, even though under local law the lien of the

judgment relates back to an earlier date. If recording or docketing is necessary under local law before a judgment becomes effective against third parties acquiring liens on real property, a judgment lien under such local law is not perfected with respect to real property until the time of such recordation or docketing. If under local law levy or seizure is necessary before a judgment lien becomes effective against third parties acquiring liens on personal property, then a judgment lien under such local law is not perfected until levy or seizure of the personal property involved. The term "judgment" does not include the determination of a quasi-judicial body or of an individual acting in a quasi-judicial capacity such as the action of State taxing authorities.

CERTIFICATION OF SERVICE

IT IS HEREBY CERTIFIED that service of this brief has been made on opposing counsel by mailing four copies thereof on this 14th day of December, 1977, in an envelope, postage prepaid, addressed to Gilbert E. Andrews, Esq., Chief, Appellate Section, Tax Division, Department of Justice, Washington, D. C. 20530, and one copy addressed to Richard Blumenthal, Esq., United States Attorney, New Haven, Connecticut 06103.



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